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March 14, 1995

VIA HAND DELIVERY

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Mr. William Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

Re: Cable Home Wiring, MM Docket No. 92-260

Dear Mr. Caton:

In accordance with Section 1.200 et seq. of the Commission's rules, this is to advise that on Tuesday, March 14, 1995, Henry M. Rivera sent the attached letter to William E. Kennard, General Counsel. An original and four copies of this letter are enclosed herein for inclusion in the above-referenced docket.

Sincerely,



Jay S. Newman  
Counsel for Liberty Cable  
Company, Inc.

Enclosures  
JSN:cas

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MAR 14 1995

FEDERAL COMMUNICATIONS COMMISSION  
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March 14, 1995

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VIA HAND DELIVERY

DOCKET FILE COPY ORIGINAL

William E. Kennard, Esq.  
General Counsel  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

Re: Ex Parte Response to NCTA Letter --  
Cable Home Wiring, MM Docket No. 92-260

Dear Bill:

In accordance with Section 1.1200 et seq. of the Commission's Rules, and on behalf of my client, Liberty Cable Company, Inc. ("Liberty"), I hereby submit this response to the ex parte letter filed by The National Cable Television Association ("NCTA") in the above-captioned proceeding on January 25, 1995. Contrary to NCTA's claims,<sup>1/</sup> Liberty's proposal to amend the Commission's cable inside wiring rules is appropriate from both a legal and a public policy perspective.

As you may know, Liberty filed a Petition for Reconsideration and Clarification of MM Docket No. 92-260 requesting that, in the context of multiple dwelling units ("MDUs"), the Commission amend its definition of cable inside wiring. Specifically, Liberty has asked the Commission to adopt a demarcation point for cable inside wiring at a location which is outside the customer's premises and within the common areas of the MDU (e.g., stairwells, hallways, basements, or rooftops) at which a subscriber's individual line can be connected to or disconnected from any cable operator's common line without destroying any part of the MDU and without interfering with the cable operator's provision of service to other residents in the MDU. Liberty also participated in the Commission's January 18, 1995, panel discussion which addressed various issues raised in the cable inside wiring proceeding including those contained in Liberty's petition.

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<sup>1/</sup> See NCTA Ex Parte Letter, dated January 25, 1995 at 1.

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This letter responds to NCTA's ex parte letter that the Commission lacks jurisdiction to move the demarcation point for MDUs and focuses on the following points: Liberty's position in the home wiring proceeding; the consistency of Liberty's position with the intent of both Congress and the Commission; the impracticality of the Commission's current inside wiring rules; and that Liberty's proposed amendment does not raise a "takings" issue. This letter does not address other issues raised by NCTA's ex parte letter as Liberty does not believe they are germane or merit comment at this time.<sup>2/</sup>

**I. Liberty's Position in the Home Wiring Proceeding.**<sup>3/</sup>

Liberty is a satellite master antenna television operator that is successfully overbuilding and competing head to head in New York City with Time Warner, the local franchised cable company. Liberty currently services approximately 27,000 subscribers at dozens of sites in the New York metropolitan area. Almost all of Liberty's subscribers are in MDUs -- cooperatives, condominiums and rental apartment buildings. Liberty is a pioneer in the use of the 18 GHz band to provide video services and has built the largest 18 GHz microwave network in the United States.

In its Petition for Reconsideration, Liberty has asked the Commission to locate the demarcation point for cable home wiring in MDUs at that point where an individual dedicated subscriber line ("Individual Line") connects to the common wiring ("Common Line"). To the extent that a service provider needs to access a junction box or other passive equipment to reach this demarcation point, it is essential that the Commission also classify such equipment as "cable home wiring". At a minimum, the Commission should impose an

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<sup>2/</sup> For example, Liberty declines to address herein (i) NCTA's unsupported claims that changing the point of demarcation would increase costs to consumers (particularly since any increase in competition in the marketplace will result in lower prices for consumers); (ii) whether the Commission has authority to allow subscribers to acquire home wiring prior to termination of service; or (iii) the issue of "sharing" home wiring. See NCTA Ex Parte Letter.

<sup>3/</sup> See generally Comments, Reply Comments, and Petition for Reconsideration and Clarification filed by Liberty in MM Docket No. 92-260 and Comments filed by Liberty in RM No. 8380.

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obligation on cable operators to facilitate access to such equipment for the purpose of allowing alternate service providers to connect their Common Line to Individual Lines.

Liberty's proposed demarcation point is a practical one which will accommodate the many different variations in MDU construction and, thereby, facilitate competition with entrenched cable monopolies. Such a demarcation point will, moreover, moot disputes over whether Individual Lines (and the conduits or molding in which they are installed) belong to the franchised cable operator or the building owner.

**II. Liberty's Position In The Home Wiring Proceeding Is Consistent With The Intent Of Both Congress And The Commission Regarding The Cable Inside Wiring Rule.**

A basic premise of the Cable Television Consumer Protection and Competition Act of 1992 was to promote increased competition to cable by alternate providers.<sup>4/</sup> One means by which Congress intended to promote such competition was by allowing alternate providers to access existing cable home wiring without disrupting the interior of a subscriber's home, making it effortless for the subscriber to switch from cable service to service provided by the alternate provider.<sup>5/</sup> Liberty's proposal is consistent with Congressional intent which is that the home wiring provisions were "not intended to cover common wiring within the MDU building"<sup>6/</sup> [emphasis added]. Liberty's proposal contemplates that inside wiring will only include those wires which connect a subscriber to the cable operator's Common Lines (and can be easily detached from or connected to the Common Line) without destroying any part of the MDU and interfering with the cable operator's provision of service to its subscribers in the MDU.

NCTA argues that, according to the 1992 Cable Act and the accompanying House Report, the home wiring provisions only apply to

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<sup>4/</sup> See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Sections 2(a)(6), 2(b)(1-2), 106 Stat. 1460 (1992).

<sup>5/</sup> See H.R. Rep. No. 628, 102d Cong. 2d Sess. at 118 (1992).

<sup>6/</sup> Id.

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wiring physically located within a subscriber's apartment.<sup>7/</sup> This narrow interpretation of the inside wiring provisions is, itself, contrary to Congress' intent in enacting the 1992 Cable Act (i.e., promoting competition in the video marketplace). This narrow interpretation would thwart Congress' efforts to allow alternate providers access to existing cable inside wiring without disrupting the interior of a subscriber's home.<sup>8/</sup> The Commission rejected this interpretation of the statute when it originally set the demarcation point "at (or about) twelve inches outside of where the cable wire enters the outside wall of the subscriber's individual dwelling unit".<sup>9/</sup> The FCC certainly would not have set the demarcation point outside a subscriber's apartment if it thought that the statute itself restricted the Commission from choosing a location outside the subscriber's apartment as the demarcation point.

While the statute directs the Commission to adopt rules to govern the disposition of "cable installed by the cable operator within the premises of [the] subscriber",<sup>10/</sup> the statute does not specify or restrict where the demarcation point may be, nor does it even refer to wiring within MDUs. In addition, the only reference in the legislative history that even mentions MDUs is a statement contained in the House Report which provides: "In the case of multiple dwelling units, this section is not intended to cover common wiring within the building, but only the wiring within the dwelling unit of individual subscribers".<sup>11/</sup> Again, the House

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<sup>7/</sup> See NCTA Ex Parte letter at 2-3 ("The Commission lacks jurisdiction to move the point of demarcation in MDU buildings to a point far outside the interior premises of the individual subscriber's dwelling units, as advocated by the petitions for reconsideration."). See also Time Warner Ex Parte Letter, dated December 5, 1994 at 3-4.

<sup>8/</sup> H.R. Rep. No. 628, 102d Cong. 2d Sess. at 118 (1992) ("House Report").

<sup>9/</sup> Implementation of Cable Television Consumer Protection and Competition Act of 1992 -- Cable Home Wiring, Report and Order, MM Docket No. 92-260 (released February 2, 1993) ("Report and Order") at ¶¶ 11 and 12 (emphasis added).

<sup>10/</sup> 47 U.S.C. § 544(i).

<sup>11/</sup> House Report at 118.

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Report does not specify or restrict where the Commission may locate the demarcation point.

Moreover, Congress' use of the word "common" to modify the phrase "wiring within the building" is significant. Specifically, the terminology used by Congress is further evidence of Congress' intent not to limit the applicability of the home wiring rules to wire located exclusively inside an apartment (as NCTA and others suggest). If Congress had wanted to limit the applicability of its rules solely to those wires physically located within the four walls of an apartment, it would not have referred to "common wiring".

Thus, regardless of whether a Dedicated Line meets a Common Line at a location which is five inches, twelve inches, five feet or any other distance outside a subscriber's premises, Liberty believes that its proposed demarcation point is consistent with the intent of both Congress and the Commission regarding cable inside wiring.

### **III. The FCC's Current Inside Wiring Rules Are Impractical.**

In February of 1993, the Commission released its Report and Order in the home wiring proceeding. The Report and Order complies, in part, with Congress' intent, stating that the definition of cable home wiring is intended to "give alternate providers adequate access to the cable home wiring so that they may connect the wiring to their systems without disrupting the subscriber's premises".<sup>12/</sup>

However, the Report and Order fails to comply with Congress' intent as it defines cable home wiring as "wiring located within the premises or dwelling unit of the subscriber" with the "demarcation point" for cable home wiring in MDUs "at (or about) twelve inches outside of where the cable wire enters the outside wall of the subscriber's individual dwelling unit".<sup>13/</sup> This failure (which makes the existing demarcation point practically meaningless) can

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<sup>12/</sup> Id. at ¶¶ 11 and 12.

<sup>13/</sup> Id. at ¶¶ 4 and 12.

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be attributed to the fact that the Commission was unfamiliar with common MDU construction practices.<sup>14/</sup>

In many MDUs in Manhattan, the cable operator installed its feeder cables in the stairwells of the MDUs.<sup>15/</sup> In these MDUs, individual wires run from each subscriber's premises to the cable operator's feeder cables in the stairwells. The Individual Lines joining the subscriber's apartment to the feeder cables in the stairwells are typically not accessible 12 inches outside the subscriber's premises since they are: (i) concealed in inaccessible pipe conduits which run in the walls and are buried in concrete floors; or, (ii) bundled into overcrowded and inaccessible hallway molding. Therefore, these wires are not readily accessible without causing substantial damage to the building and the subscriber's apartment. Attached as Exhibit A is a diagram illustrating this problem.

#### **IV. Liberty's Proposed Amendment Does Not Violate The Constitution.**

NCTA suggests that Liberty's proposed amendment to the cable home wiring rules may be unconstitutional because it authorizes a "taking" of property.<sup>16/</sup> However, the cable home wiring rules proposed by Liberty do not cause a taking of property for various reasons including the fact that the home wiring rules would not compel the permanent physical possession of the wiring by a third

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<sup>14/</sup> The Commission's existing cable inside wiring demarcation point is probably appropriate in the context of most single family homes where a location that is twelve inches outside of the home is usually an accessible location.

<sup>15/</sup> While the cable operator generally lays claim to the wire as his property, in fact, its original ownership after a decade or more is often untraceable. In many instances, the building owner installed these wires itself.

<sup>16/</sup> See NCTA Ex Parte Letter at n.7 ("Adoption of any of the proposals to radically alter the Commission's existing home wiring rules would also cause insurmountable taking issues under the fifth and fourteenth amendments to the U.S. Constitution.").



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party.<sup>17/</sup> Cf., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Instead, the cable home wiring rules regulate the manner in which the cable home wiring is sold, removed or abandoned upon voluntary termination of the relationship between a cable company, a subscriber and an MDU owner that was created when the cable home wiring was first installed in the MDU. In Federal Communications Commission v. Florida Power Corporation, 480 U.S. 245, 107 S.Ct. 1107 (1987) ("Florida Power"), the United States Supreme Court ruled that the Pole Attachments Act, 47 U.S.C. § 224, does not cause a taking of property because the statute did not require the utility to give up pole space to a cable company. The cable home wiring rules likewise do not require the cable operator to give up its wires, it merely regulates the disposition of the wire after the cable operator has no need for it.

Moreover, such regulation is not a "taking" of property merely because it may place constraints on the use of the wire. See Florida Power; Warschauer Sick Support Soc. v. State of New York, 754 F.Supp. 305, 307 (E.D.N.Y. 1991) (New York law requiring cemetery plots to be offered for sale to the cemetery at original cost plus 4% before sold on the open market is not a taking of property.). Like the Pole Attachment Act discussed in Florida Power, the cable inside wiring rules, as applicable to MDUs, merely regulate the terms and conditions of a relationship that had been previously and voluntarily entered into between the relevant parties.

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<sup>17/</sup> We note that, under both the current rules and Liberty's proposed amendment, a subscriber may acquire the inside wiring at its replacement cost. While subscribers could certainly purchase the inside wiring themselves, Liberty would be willing to pay this fee on behalf of subscribers, just as long distance carriers offer subscribers an incentive to trial their services.

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Based on the foregoing, and for the reasons set forth in Liberty's prior submissions to the Commission in this proceeding, Liberty respectfully requests that you advise the Commission to reconsider its demarcation point for cable inside wiring in MDUs as requested by Liberty.

Sincerely,

Henry M. Rivera

Attorney for  
Liberty Cable Company, Inc.

cc: William Caton

